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In The  
**Supreme Court of the United States**  
October Term, 1991

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WALTER CHRISTOPHER GURASICH,  
*Petitioner,*  
v.

PEOPLE OF THE STATE OF CALIFORNIA,  
*Respondent.*

— ♦ —  
**Petition For Certiorari To The  
Court Of Appeal Of California,  
Second Appellate District**

— ♦ —  
**REPLY TO BRIEF IN OPPOSITION**

— ♦ —  
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**REPLY TO BRIEF IN OPPOSITION**

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Pursuant to the Court's Rule 15.6, petitioner Walter Gurasich respectfully submits this reply brief addressing arguments first raised in the State of California's brief in opposition. In his petition for a writ of certiorari, petitioner argued that, under *Grady v. Corbin*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2084, 109 L.Ed.2d 199 (1990), his second prosecution violated the prohibition against double jeopardy because the state in the second trial relied on conduct for which petitioner already had been acquitted – that is, the

alleged agreement between petitioner and Vaccaro to destroy the motorhome.

The state now concedes that the conduct sought to be proved in the two prosecutions was the same. Its brief in opposition to the petition acknowledges: "to be sure, the 'conduct' in question was petitioner's conspiratorial agreement with Mr. Vaccaro." (Opp. 7).<sup>1</sup>

The state argues, however, that it does not matter whether the conduct involved in the two trials was identical, so long as the two crimes involved separate elements - i.e., intent (Opp. 7). Specifically, the state argues that petitioner's acquittal for conspiracy to commit arson did not bar his subsequent prosecution for conspiracy to commit insurance fraud because an agreement to burn a motorhome is different from an agreement to defraud an insurance company by burning a motorhome (Opp. 10, 19).

According to the state, a subsequent prosecution is barred only when the government must prove in the second trial "conduct that constitutes *all the elements* of the offense for which the defendant was previously prosecuted." (Opp. 12-13, emphasis in original). The state further argues that, under its reading of *Grady*,

"Evidence of conduct which establishes one or more *but not all* elements of an offense alleged in the first prosecution may be relied upon to establish one or more *but not all* elements of an

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<sup>1</sup> The state's brief in opposition to the petition for a writ of certiorari is cited as "Opp.", followed by a page number.

offense alleged or proved in the subsequent prosecution."

(Opp. 17, emphasis in the original). In other words, if two offenses contain different elements, then double jeopardy does not bar separate prosecutions.

This conclusion, of course, is simply a restatement of the "elements of the offense" test established in *Blockburger v. United States*, 289 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Yet, as this Court held in *Grady*, the *Blockburger* analysis is only the first step in determining whether the Double Jeopardy Clause prohibits a successive prosecution (*Grady, supra*, 110 S.Ct. at 2090). Even when a successive prosecution survives *Blockburger* analysis, the second trial is prohibited if a conviction in that trial would require proof of conduct for which the defendant has already been prosecuted (*Id.* at 2093).

The point which respondent misses or ignores is that the state cannot transform an acquittal of conduct into a conviction for such conduct by the vehicle of successive, but subtly re-named, prosecutions. Petitioner was acquitted of agreeing with Vaccaro to burn his motorhome. He should not have been continually prosecuted for such conspiracy until convicted of some differently-named, but factually-identical, offense.

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### CONCLUSION

If the State of California is as confused about *Grady's* import as its brief suggests, the need for clarification from this Court is unmistakable.

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